MAY 27 1976

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1617

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al,

Petitioners,

v.

BETTY STEPHENS, et al,

Respondents.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

EDWARD J. UTZ
Attorney for Respondent
Warren County Commissioners
1306 Fourth & Walnut Bldg.
36 E. Fourth Street
Cincinnati, Ohio 45202
513/241-8829

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
QUESTION PRESENTED FOR REVIEW	1
STATEMENT OF CASE	2
THE WRIT SHOULD BE DENIED	2
ARGUMENT	3
CONCLUSION	11
APPENDICES:	
Section 305.12, Ohio Revised Code	1a
Section 16, Ohio Constitution	1a
Section 127.11, Ohio Revised Code	2a
Section 2743.01, Ohio Revised Code	4a
Section 2743.02, Ohio Revised Code	5a

CASES

Broughton v. Cleveland, 167 Ohio St. 29, 146 N.E. 2d 30	6
Commissioners of Hamilton County v. Mighels, 7 Ohio St. 109	3-4, 6
Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736, Cert. Denied 409 U.S. 1052, Rehearing Denied 410 U.S. 918	4, 5
Palumbo v. Ind. Commission, 140 Ohio St. 54, 42 N.E.2d 766	4
Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102	4

	Page
Schaffer v. Board of Trustees, 171 Ohio St. 228, 168 N.E.2d 547	3, 6
Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed. 90, 94 S. Ct. 1683	2, 3, 8, 9
State ex rel. Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82	4
Thacker et al. v. Board of Trustees, 35 Ohio St. 2d 49, 298 N.E.2d 542	5
Tinsley v. Cincinnati, et al., 5 Ohio Opinions 2d 454	6
Wolf v. Ohio State Univ. Hospital, 170 Ohio St. 49, 162 N.E.2d 475	3, 4

STATUTES AND OTHER AUTHORITIES

Constitution of United States Fourteenth Amendment	2
Ohio Constitution, Article I, § 16	3, 4
Ohio Revised Code, § 121.11	7
Ohio Revised Code, § 305.12	3
Ohio Revised Code, § 2743.01	8
Ohio Revised Code, § 2743.02	8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1617

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al,
Petitioners,

v.

BETTY STEPHENS, et al,
Respondents.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINIONS BELOW

The opinions of the Court of Common Pleas and of the Court of Appeals are set forth in the Petition for Certiorari heretofore filed with this Court.

QUESTION PRESENTED FOR REVIEW

May a state court apply the doctrine of sovereign immunity in dismissing the State of Ohio and its employees, Directors of the Department of Rehabilitation and Cor-

rection and of the Department of Mental Health and Mental Retardation, all past and present members of the Board of County Commissioners of Warren County, Ohio, all past and present members of the Warren County Board of Mental Retardation and Green Knoll School, without thereby denying the petitioners' right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution?

To this the Members of the Board of County Commissioners of Warren County, Ohio say YES.

STATEMENT OF THE CASE

The Statement of the Case set out in the Petition is correct and adopted by Respondent, The Members of the Board of County Commissioners of Warren County, Ohio.

THE WRIT SHOULD BE DENIED

The Members of the Board of County Commissioners contend that the Courts of Ohio were correct in their decision and:

1. That there is no conflict with the recent decision of this Court in *Scheuer* v. *Rhodes,* 416 U.S. 232, 40 L.Ed. 2d 90, 94 S.Ct. 1683 (1974), and the laws of the State of Ohio.

2. That the petitioners were not effectively deprived of their rights to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

ARGUMENT

Counsel for the Petitioner in this case has argued that the case of *Scheuer* v. *Rhodes,* 416 U.S. 232, 40 L.Ed. 2d 90, 94 S.Ct. 1683 (1974), applies in this case. We submit that the concept of governmental immunity set forth in the case of *Schaefer* v. *Board of Trustees,* 171 Ohio St. 228, 168 N.E. 2d 547, cannot be abrogated by the judiciary. It is submitted that the constitutional provision that suits may be brought against a state, in such courts and in such manner as may be provided by law, is not self executing but requires passage of legislation to activate it, and in the absence of statutory authorization the state and its instrumentalities, including counties and their agencies are completely immune from suit for negligence. *Constitution, Article I, § 16 (Appendix I), Ohio Rev. Code § 305.12.*

Appendix II Warren County is a sub-division of the State of Ohio organized for judicial and political purposes and it is not a legal person or a separate political entity. It differs from the municipal corporation in that the municipal corporation is a corporation invested with certain powers of a private or proprietary nature. Ohio has held that the framers of its Constitution clearly recognized the doctrine of sovereign immunity, as a part of the substantive law of Ohio and made the abrogation of such immunization a legislative function. "Although such provision is not in our constitution, it is not self-executed but recognizes the passage of legislation to activate it." *Wolfe* v. *Ohio State University Hospital,* 170 Ohio St. 49, 162 N.E. 2d 475. In *Commissioner's of Hamilton County* v. *Mighels,* 7 Ohio St. 109, at page 110 the Ohio Supreme Court held:

"The Board of Commissioners of the County are not liable in their quasi-corporation capacity either by statute or said common law to an action for damages where injury resulting to a private party by their negligence in the discharge of their official functions."

We take issue with the allegation of the Petitioner that the doctrine is judicially created, and, as such, can be abrogated by the judiciary. The Supreme Court of Ohio has held that the immunity of the state of Ohio from suit where damages are sought is a creature of the Ohio Constitution. The most important case on this point is *Krause* v. *State,* 31 Ohio St. 2d 132, 285 N.E. 2d 736 *cert. denied,* 409 U.S. 1052, *rehearing denied,* 410 U.S. 918. The Supreme Court of Ohio held:

"1. The State of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly. (*Raudabaugh* v. *State,* 96 Ohio St. 513; *Palumbo* v. *Indus. Comm.,* 140 Ohio St. 54; *State ex rel. Williams* v. *Glander,* 148 Ohio St. 188; and *Wolf* v. *Ohio State University Hospital,* 170 Ohio St. 49, 162 N.E. 2d 475, approved and followed.)

2. Section 16 of Article I of the Ohio Constitution, Appendix I as amended September 3, 1912, abolished the defense of governmental immunity and empowered the General Assembly to decide in what courts and in what manner suits may be brought against the state.

3. Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912 provides that '. . . Suits may be brought against the state in such courts and in such manner as may be provided by law,' is not self-executing, and statutory consent is a prerequisite to such suit." (*Raudabaugh, Palumbo, Williams,* and *Wolf, supra,* approved and followed.) 31 Ohio St. 2d at 132, 285 N.E. 2d 736, 737.

The Supreme Court of Ohio speaking through Chief Justice O'Neill rejected petitioner's judicial abrogation theory when he stated:

"Although the doctrine of governmental immunity was originally judicially created, it is not now subject to judicial re-examination. When the people of Ohio, in 1912, adopted Section 16 of Article I as part of the organic law of this state, they foreclosed to this or any other court the authority to examine the 'soundness' or 'justice' of the concept of governmental immunity. The people of Ohio placed that policy decision in the hands of the General Assembly, and the merits or demerits of granting or withholding consent are to be debated and determined by that body alone. It is not within the province of the judiciary to make that determination. Nor can we make that constitutional provision meaningless. The alternative remedy is by constitutional amendment." 31 Ohio St. 2d 132, 147, 285 N.E. 2d 736, 745.

This theory was followed in *Thacker, et al.* v. *Board of Trustees,* 35 Ohio St. 2d 49, 298 N.E. 2d 542. In both *Krause* and *Thacker, supra,* the Ohio Supreme Court rejected the judicial abrogation theory. It is clear by reading the dissents in both cases, especially those of Justices Corrigan and W. Brown in *Thacker,* that the Court was explicitly rejecting the modern trend argument as put forth by Petitioners.

With respect to the respondents, the Warren County Commissioners, this case involves an appeal from a decision and judgment entry of the trial court affirmed by the Court of Appeals and certification refused by the Supreme Court of Ohio from a decision and judgment entry

of the trial court, dismissing "all past and present members of the Board of County Commissioners of Warren County, all past and present members of the Warren County Board of Mental Retardation Green Knoll School." The Court stated in making its ruling:

> "The court can find nothing in the allegations of fact or legal argument so far submitted by which this case can be excluded from the concept of official governmental immunity embodied in the cases of *Schaffer* v. *Board of Trustees,* 171 Ohio St. 228; *Commissioners of Hamilton County* v. *Mighels,* 7 Ohio St. 109; *Tinsley* v. *Cincinnati, et al.,* 5 O.O. 2d 454; *Broughton* v. *Cleveland,* 167 Ohio St. 29."

Relying upon those decisions, the courts of Ohio, have in effect, affirmed the decision of the trial court which is stated: "That there is no genuine issue to any material fact and that the Complaint fails to state a claim against these moving defendants, upon which relief can be granted."

The only allegations referring to the Warren County Commissioners, Case No. 31697, below, are contained in Paragraph 10 of the Third Amended Complaint which states:

> "That at the time and place the defendant, Betty Stephens, was an employee and agent, acting in the course and scope of her agency for defendants, the State of Ohio, the Department of Rehabilitation and Correction and the Department of Mental Health and Mental Retardation, Warren County Commissioners, The Warren County Board of Mental Retardation, and Green Knoll School, The Warren County School for retarded children. Said defendants hired and maintained a know negligent agent by employing Betty Stephens; and, said defendants negligently entrusted a 1967 International School Bus to Betty Stephens and

> they knew, or should have known, of Betty Stephens' tendency to drive wrecklessly (sic)."

In case No. 34697, below, it was alleged:

> "1. That the defendants, Dr. Harry Coronett (sic), Arch Hildebrand and Robert K. South, constitute the duly elected qualified and acting Board of County Commissioners of Warren County, Ohio.
>
> "2. That the defendants, Thelma S. Sumner, Joe Smallwood, Dorothy Scholl, Donald G. Slorp, Warren Hauser, Kyle Cook, Marian Snyder and Sylvia Gross, constitute the duly appointed, qualified and acting Board of Mental Retardation of Warren County, Ohio . . .
>
> "12. That at all times mentioned herein, that, Betty Stephens, was the employee and/or agent and/or sub-agent of the Ohio Department of Mental Hygiene and Correction and/or the Division of Mental Retardation of the State of Ohio and/or the Warren County, Ohio Board of Mental Retardation and/or the Warren County, Ohio Board of County Commissioners acting within the scope of her employment and/or agency and/or subagency."

We submit that the courts of Ohio correctly sustained the Motion for Summary Judgment filed on behalf of the Warren County Commissioners based upon the doctrine of governmental immunity.

Petitioners state "the doctrine of governmental immunity has been judicially created and, as such, it can be abrogated by the judiciary." Petitioners' brief, page 9. While it is true that this doctrine has judicial approval in this state, it also had, until January 1, 1975, implied legislative approval by reason of the enactment of Sec. 127.11 (Appendix

III), establishing the Sundry Claims Board. If there was any doubt that this Section recognized the legislative approval of the doctrine of governmental immunity, it was clearly put to rest by the enactment of Chapter 2743 (Appendix IV), of the Revised Code in which the legislature declared that, "the State hereby waives its immunity from liability and consents to be sued" (2743.02 R.C.). Surely, the legislature of the State of Ohio could not waive immunity from liability if it did not recognize that such immunity already existed. Furthermore, Sec. 2743.01 (A) provides, in fact, that the waiver by the State does not include political subdivisions and Sec. 2743.01 (B) provides that political subdivisions include, "Municipal Corporations, Townships, Villages, Counties and School Districts and all other bodies corporate and politics responsible for governmental activities only in geographic areas smaller than that of the State, to which the sovereign immunity of the State attaches." It is obvious therefore that the legislature intended for a limited waiver of the rule of sovereign immunity beginning January 1, 1975. It seems to us that it would be grossly improper for a judicial body to overrule that legislative determination and statement of policy.

Petitioners contend that the doctrine of governmental immunity is no longer an automatic bar to claims for damages against the State, County or Board of Education officials, relying on *Scheuer* v. *Rhodes,* 416 U.S. 232, 40 L. Ed. 2d 90, 94 S.Ct. 1683 (1974). Petitioners' reliance upon *Scheuer* is misplaced. This Court held in that case that in varying scope, qualified immunity to suit is available to officers of the executive branches of government, the variations being dependent upon the scope of discretion and responsibilities of office, and all circumstances as they reasonably appear at the time of action on which liability is sought to be based, and the existence of rea-

sonable grounds for belief formed at the time and in light of all the circumstances that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct.

In *Scheuer,* this Court held, at page 237:

> "However, since Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he
>
> > 'comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.' Id., at 159-160, 28 S.Ct., at 454. (Emphasis supplied.)"

There is no allegation, whatever, in the Complaints in this case that the respondents have deprived another of a federal right under the color of state law. There are no allegations in this case that the respondent County Commissioners' acts were intentional, reckless, willful and wanton, and, thereby deprived plaintiff of her property or life without due process of law, and therefore *Schueur* has no application to this case.

In *Scheuer* the statute relied upon and included within its scope:

> "'(M) isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is

clothed with the authority of state law,' id., at 184, 81 S.Ct., at 482 (quoting *United States* v. *Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941), government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. Indeed, as the Court also indicated in *Monroe* v. *Pape, supra,* the legislative history indicates that there is no absolute immunity. Soon after *Monroe* v. *Pape,* Mr. Chief Justice Warren noted in *Pierson* v. *Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967), that the 'legislative record (of § 1983) gives no clear indication that Congress meant to abolish wholesale all common-law immunities,' Id., at 554, 87 S.Ct., at 1218. The Court had previously recognized that the Civil Rights Act of 1871 does not create civil liability for legislative acts by legislators 'in a field where legislators traditionally have power to act.' *Tenney* v. *Brandhove,* 341 U.S. 367, 379, 71 S.Ct. 783, 789, 95 L.Ed. 1019 (1951). Noting that '(t)he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries,' id., at 372, 71 S.Ct., at 786, the Court concluded that it was highly improbable that 'Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by convert inclusion in the general language . . .' of this statute. Id., at 376, 71 S.Ct., at 788."

CONCLUSION

This is clearly a negligence case and not a case of the individual liability of a public official acting in his public capacity where the issue is whether he acted in good faith in claiming an emergency and the actions taken to cope with the emergency so declared. In this case there is no question about an emergency nor is there a question of good faith. It is clearly a question of negligence. A negligence case has been decided by the Courts of Ohio and the Petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. UTZ

Attorney for Respondent
Warren County Commissioners

1306 Fourth & Walnut Bldg.
36 E. Fourth Street
Cincinnati, Ohio 45202
513/241-8829

APPENDIX I

---

§ 305.12 Liability of commissioners. (GC § 2408)

The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain, and defend all suits in law or in equity, involving an injury to any public, state, or county road, bridge, ditch, drain, or watercourse established by such board in its county, and for the prevention of injury thereto. The board shall be liable, in its official capacity, for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county, or any money or other property due the county. The money so recovered shall be paid into the county treasury, and the board shall take the county treasurer's receipt therefor and file it with the county auditor.

APPENDIX II

---

§ 16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

APPENDIX III

§ 127.11 Sundry claims board.

There is hereby created a "sundry claims board" to consist of the director of finance or an employee in his department designated by him, who shall be in the unclassified service, who shall be president, the auditor of state who shall be secretary, the attorney general, the chairman of the senate finance committee, and the chairman of the finance commttiee of the house of representatives. In the event of the absence, illness, disability, death, or resignation of the chairman of the house finance committee, the speaker of the house or a member of the house designated by him may serve in place of the chairman of the house finance committee as a member of the sundry claims board until the return of such chairman or the appointment of another chairman. In the event of the absence, illness, disability, death, or resignation of the chairman of the senate finance committee, the president pro tempore of the senate or a member of the senate designated by him may serve in the place of the chairman of the senate finance committee as a member of the sundry claims board until the return of such chairman or the appointment of another chairman. While a member of the sundry claims board, the member of the general assembly shall be entitled to compensation for service as provided in this section for the chairman of either the house or senate finance committee. The board may receive original papers representing claims against the state. Such claims shall be filed and properly designated either by number or short title, or both. All such claims shall be carefully investigated by such board. The president of the board may administer oaths, compel

the attendance of witnesses, and compel the production of books and papers. He may punish for disobedience of subpoena, for refusal to be sworn or to answer as a witness, or for failure to produce books and papers, in the same manner as officers authorized to take depositions. After such investigation, the board shall either approve, approve with conditions and limitations, or disapprove each such claim, and append to the original papers representing each claim, a concise statement of facts brought out in such investigation upon which its approval or disapproval is based. Such original papers and appended statements shall be filed in the office of the department of finance, and delivered to the chairman of the finance committee of the house of representatives of the next general assembly promptly upon the appointment of such chairman. A copy of the appended statement shall be kept on file in the office of the department and, together with the original papers representing such claims and any other matters pertaining thereto, shall be kept on file for a period of ten years.

When any claim filed with it has been approved by the board in an amount of one thousand dollars or less, the auditor of state, upon being presented with a voucher for the payment thereof signed by the president and secretary of the board, shall, if money has been appropriated for the payment thereof, issue his warrant drawn on the treasurer of state in the amount set out in such voucher. In February of each odd-numbered year beginning in 1963 the director of finance shall estimate the cost of paying all the claims in an amount of one thousand dollars or less to be allowed by the board during the next succeeding biennium. He shall submit the estimate to the chairman of the finance committee of each house to allow the general assembly to appropriate funds for the payment of claims in an amount

of one thousand dollars or less which may be allowed by the board during the next succeeding biennium.

A per diem of thirty-five dollars for each day actually spent by the chairman of the finance committee of the senate and house of representatives, respectively, while in the performance of the duties enumerated in this section, and upon the summons of the president of the board, together with their necessary expenses, shall be paid from the funds appropriated for the expense of legislative committees upon vouchers approved by the president and secretary of the board. This section shall not be construed to conflict with section 101.26 of the Revised Code.

APPENDIX IV

§ 2743.01 [Definitions.]

As used in Chapter 2743. of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

§ 2743.02 [State waives immunity from liability.]

(A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This chapter is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to the effective date of this section.

(C) Such hospital may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Awards against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery by the claimant.